SUPREME COURT, U. S.

AUG 8 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 74-92

JOHN SHERMAN MILES,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause on June 17, 1974, and the judgment overruling the petition for rehearing or rehearing In Banc entered July 10, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, was entered on June 17, 1974. The opinion of the Court is shown in the appendix at page A1. The judgment overruling the petition for rehearing or rehearing In Banc entered July 10, 1974 is shown in the appendix at page A3.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1974, and the order of the Court overruling the petition for rehearing or rehearing In Banc was entered July 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101.

QUESTION PRESENTED

1. Whether the opinion of the Court of Appeals is in error and in conflict with applicable decisions of this court, particularly *U. S.* v. *Maze,* 94 S.Ct. 645 (1974) with respect to the question of whether Petitioner was entitled to a judgment of acquittal at the close of the Government's case because there was no evidence that use of the mails played any part in the execution of a scheme to defraud in violation of Title 18, United States Code, Section 1341.

STATUTES INVOLVED

Title 18, Section 1341, United States Code, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to

be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 561.450, Missouri Revised Statutes, provides:

Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception, or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called "the confidence game," or by means or by use, of any false or bogus check or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds or by means or by use, of any corporation stock or bonds or by any other written or printed or engraved instrument or spurious coin or metal, shall be deemed guilty of a felony and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari presented by Petitioner who was charged and convicted in the United States District Court for the Western District of Missouri of violation of 18 U.S.C. Section 1341—Use of Mails to Defraud.

The evidence presented by the Government may be summarized as follows: Robert Totten testified that the Petitioner John Miles, Gary Morris and himself devised a plan whereby Morris and Totten, Morris' roommate, would buy some cattle at Fair Play, Missouri, with a no-account check drawn on a bank at Leeton, Missouri, using a false driver's license in the name of "John W. Rogers" as identification. Miles supplied Totten with the false driver's license and a blank counter check from the Leeton, Missouri, bank. After the cattle were bought in the name of Rogers, Morris and Totten returned for them that night in Miles's truck and took them back to Miles's farm. They purchased 71 head of cattle, but because of the size of Miles's truck they had to leave 15 head behind at the auction yards in Fair Play. When Miles received the cattle he disposed of them by selling the cattle at various auction barns in Missouri.

Prior to trial, Petitioner moved to dismiss the Indictment on the grounds that the Indictment did not state facts sufficient to constitute an offense under 18 U.S.C. Section 1341 and renewed the motion at the close of the Government's case. The Court overruled Petitioner's contentions.

Petitioner was convicted and appealed. The conviction was affirmed by the United States Court of Appeals for the Eighth Circuit on September 10, 1973. The prior opinion of the Court of Appeals is shown in the appendix at p. A5. Petitioner's Petition for Rehearing or for Rehearing before the Court In Banc was overruled on October 10, 1973. Petitioner duly filed his Petition for Writ of Certiorari to this honorable court and the case was docketed as Case No. 73-7251. On March 18, 1974, this honorable court granted appellant's Petition for Certiorari, vacated the judgment of the Eighth Circuit, and remanded

the cause to the Eighth Circuit for reconsideration in light of the decision in *U. S.* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), 42 L.W. 4113 (Decided January 8, 1974). See *Miles* v. *U. S.*, 94 S.Ct. 1553 (1974). Three Justices of this Court would have affirmed appellant's conviction. On June 17, 1974, on remand, the Eighth Circuit affirmed appellant's conviction. On July 10, 1974, the Eighth Circuit overruled appellant's Petition for Rehearing or for Rehearing before the Court In Banc.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts both with applicable decisions of this Court, more particularly, *U. S.* v. *Maze,* and with the decisions of other Courts of Appeals as to the question of whether the giving of a "no-account" check constitutes use of the mails in violation of U.S.C. Section 1341, especially where the scheme to defraud was completed at the time of the giving of the check by the taking of cattle and the alleged offenders did not expand their scheme. In any event, the issue presented, which involves expansion of Federal Criminal jurisdiction to include prosecution of "no-account" checks, is an important question of Federal law which should be settled by this Court.

The indictment in brief charged defendant and two others with devising a scheme to defraud and to obtain cattle by deceit from the Fair Play Sales and Auction Company. Specific acts charged to the defendant were that defendant gave to Morris and Totten on February 19, 1972 a blank check of the Bank of Leeton, Missouri and a driver's license in the name of John Rogers to be used for identification, knowing there was no bank account at the Bank of Leeton in the name of John Rogers. The indictment further charged that Morris and Totten did in fact on February

21, 1972 give a "no account" check to the auction company for 71 head of cattle and did remove the cattle on that date from Fair Play, Missouri to defendant's farm at Lone Jack, Missouri. The indictment further charged that Morris and Totten, at the direction of Miles, removed the cattle to Miles's farm before the check could clear through normal banking channels and before Fair Play Auction could become aware of their loss and locate the cattle in possession of defendant. Finally, the indictment charged that Morris, Totten and defendant, "for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly caused to be delivered by mail, according to the directions thereon, letters containing the aforesaid check on the Bank of Leeton . . . between Fair Play, Missouri, Kansas City, Missouri and Leeton, Missouri." (Tr. pp. 320-323). Leeton is approximately eighty-five (85) road miles from Fair Play (Source—Rand-McNally Road Atlas).

The evidence on this charge, however, showed that there was no proof at all with respect to the charge in the indictment that defendant or anyone else intended to use the mails to defraud anyone, that in fact it was never discussed by anyone, that in fact, contrary to the indictment, Fair Play Auction had knowledge that a "no account" check had been given at least the day after the transaction, that the transaction was complete on the day the check was given, and that the use of the mails was merely collateral or incidental to the full scheme.

Robert Totten testified that he, Morris and Miles didn't actually discuss how the check would go through channels (Tr. p. 195). Bruce Hopkins, owner of the Fair Play Auction Company where the check was given, testified that when the check was given for purchase of the cattle at 3:00 A.M. on February 21, 1972, the deal was completed,

that, in the cattle business, the transactions are cash transactions (Tr. p. 64). Hopkins further testified that he called Mr. McAllister at the Leeton Bank on February 22, 1972 and found out on that date that the check was "no account" (Tr. pp. 65, 51, 62-63). Michael Bruce Hopkins testified that he knew defendant's truck and that he knew it was defendant's truck on February 21, 1972, the day the cattle were being loaded on the truck (Tr. pp. 79-80). Mrs. Griffin, a clerk at Fair Play Auction, testified she gave Totten a "loading out" sheet to load the cattle (Tr. p. 89). Donald Nottingham of the Fair Play Bank, testified that there was no requirement that the mails be used to clear checks and that some banks use a messenger service (Tr. p. 116). Nottingham further testified that Fair Play Auction could write checks on the deposited $13,750 check on February 22, 1972, the day the check was deposited (Tr. p. 128). Maurice Chandley of City National Bank, Kansas City, Missouri, testified that messenger service was used to deliver items outside the Greater Kansas City Area (Tr. p. 134).

Under these facts, defendant should have been acquitted at the close of the Government's case. All of the evidence indicated that the transaction was complete on the day the check was given—and that use of the mails played no part in the execution of the scheme.

This Court's decision in *United States* v. *Maze*, 414 U.S. 395 (1974) requires reversal of the conviction of Appellant.

The opinion of the Supreme Court in *Maze*, and its remand of the *Miles* case to this Court for further proceedings consistent with the opinion in the *Maze* case, together with the basic similarity of the facts in the two cases, requires the reversal of Miles's conviction.

The facts in *Maze* were that Maze stole a credit card issued by a Louisville bank, which he used to obtain goods and services in four different states knowing that the operators to whom he presented the card for payment would mail the sales slips to the Louisville bank, which in turn would mail them to the owner of the credit card. The indictment charged that the delay in the mailing would enable Maze to continue purchasing goods and services for an appreciable period of time.

The indictment in the instant case charged Miles with participation in a fraudulent scheme to obtain cattle with a no-account check from a cattle sales barn in Fair Play, Missouri, and then to dispose of them before the check could clear through normal banking channels which would involve the use of the mails. It was contended by the government that the delay in the check clearing through the mails was a delay necessary for the success of the fraud so that Miles could dispose of the cattle.

Maze contended successfully in the Court of Appeals and in this Court that the fraudulent scheme had been consummated by the time the mailing occurred, and that the mailing was not for the purpose of executing the scheme. This Court in essence held that one who merely "caused" the mails to be used in connection with a scheme to defraud did not violate the Statute, unless the mailing was "for the purpose of executing the scheme, as the Statute requires."

In the concluding paragraph of the opinion the Court said:

> ". . . Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use

> of the mails be for the purpose of executing such a scheme or artifice . . . . Since the mailings in this case were not for that purpose the judgment of the Court of Appeals is *affirmed*."

The Court rejected the contention of the government that the success of the fraudulent credit card scheme was the "delay" caused by the use of the mails "which aids the perpetrator in the continuation of a fraudulent credit card scheme and the postponement of its detection."

The Court reasoned that Maze's scheme reached fruition when he checked out of the motel and there was no indication that the success of his scheme depended in any way on the mailings, that from Maze's point of view, he probably would have preferred to have the invoices misplaced and never mailed at all.

The same reasoning applies to Miles. His scheme reached fruition when the cattle were received for the no-account check. The success of his scheme did not depend upon the delay cause by the subsequent mailings of the check. There is no difference between the delay in *Maze*, which allowed him to continue his fraudulent credit card scheme and postpone detection, and the delay in *Miles*, which allowed him to dispose of the cattle and postpone detection.

This Honorable Court in *Maze* reaffirmed the rule of *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, which this court succinctly and accurately stated in *Bliss* v. *United States*, 354 F.2d 456, 457:

> . . . use of the mails after a scheme to defraud has been completed is not a use for the purpose of executing a scheme and thus is not an offense under the Statute . . . ."

The Court distinguished *United States* v. *Sampson*, 371 U.S. 75, and *Pererira* v. *United States*, 347 U.S. 1, from *Kann* and *Parr*. The Eighth Circuit apparently is relying upon *Sampson* and *Pererira* in affirming Miles's conviction as did the government in *Maze* before the Supreme Court. This Court distinguished *Sampson* on the basis that it was a lulling case and that the subsequent mailings in that case were designed to lull the victim into a false sense of security postponing their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if the mailings had been place. *Pererira* was distinguished on the basis that the mailings played a significant part in enabling the defendant in that case to acquire dominion over the $35,000 with which he ultimately absconded. This Court emphasized that in *Pererira* the defendant did not obtain the fruits of his fraud until after the mailing had occurred.

The rules of the *Kann* and *Parr* cases are clearly controlling in this case where the fraudulent scheme had been completed prior to the mailing. The testimony from the government's own witnesses was that the transaction was complete, that it was a cash transaction. All that the fraud entailed was the obtaining of the cattle—and that transaction was complete prior to any mailing.

Moreover, the facts of this case, it is respectfully urged, simply will not justify any inference that the mailing was for the purpose of executing any scheme. *Maze, supra,* at 42 L.W. 4114. There can be no argument made that on these facts any delay because of mailing contributed to the scheme's success because it postponed the detection of the scheme. The facts here clearly show that the auction company knew of the fraudulent scheme even before the mailing of any check, yet decided to have same go through banking channels anyway. The evidence also permits an

inference that Miles may have sold the cattle prior to any mailing. Thus, all of the testimony here was to the effect that the alleged conspirators never discussed the mailing of any no-account check—it was, to paraphrase the wording of the *Kann* case—immaterial to them how the cattle auction company presented the check drawn on the Bank of Leeton. Certainly, it is not unreasonable to suppose that for a check of over $13,000 the auction company would have proceeded by car to the Bank of Leeton eighty-five (85) miles away. Applying the wording of the *Maze* case that it is "the distance, and not the mail service, which covers the time lag in the physical transmission of such correspondence." (414 U.S. 395, 403), certainly it cannot be reasonably supposed that the giving of a check of the amount in question on a Bank eighty-five miles away would have postponed the detection of the scheme. As was said in *Dyhre* v. *Hudspeth, Warden,* 106 F.2d 286 (10th Cir., 1939):

> ". . . but the charge clearly shows that the United States mail could not have been used for the purpose of executing or in attempting to execute the fraudulent scheme, because the mailing did not take place until *after the defendant had induced the parties named to accept the fraudulent check for merchandise.*" (Emphasis added).

The *Dyhre* case then quotes from another 8th Circuit case, *Stewart* v. *United States,* 119 Fed. 89, 90:

> ". . . that the indictment did not clearly show that the letter in question was deposited in the mail in execution of the alleged scheme to defraud, but rather disclosed that it was so deposited after the scheme had been executed."

Perhaps a key case is *Friedman* v. *U. S.*, 347 F.2d 697 (8th Cir., 1964), cited with approval in *Bliss, supra.* In *Friedman,* the court recognizes an exception to the *Kann* rule only if use of the mails is part of an overall or unitary scheme to defraud (not here involved), or if use of the mails occasions a delay in detection of the scheme *and the delay permitted defendants to expand their scope of operations.* Applying *Friedman,* there can be no conviction in this case as neither of the factual circumstances therein cited apply to the facts of this case.

In mail fraud cases a real question is apparently whether the mailings in question were sufficiently closely related to the fraudulent scheme so as to bring the conduct within the Statute. *Maze, supra,* 42 L.W. at p. 4114. This construction of the Statute is based upon the judicial view that the mail fraud statute should be "carefully and strictly construed" to avoid excessive application (*U. S.* v. *Kelem,* 9 Cir., 416 F.2d 346, 347; *U. S.* v. *Chason,* 2nd Cir., 451 F.2d 301, 303). One of the reasons for narrow, careful construction is to avoid reaching criminal conduct in fields which "the State can, and should, effectively and appropriately control." *U. S.* v. *Edwards,* 458 F.2d 875, 880 (5th Cir., 1972). See also *Kline* v. *Burke Construction Company,* 260 U.S. 226 (1972); *U. S.* v. *Owens,* 17 Fed. 72; *U. S.* v. *Maze,* 468 F.2d 529 (6th Cir., 1972), affirmed, 42 L.W. 4113 (January 8, 1974).

The Federal Mail Fraud Statute was not enacted to enforce violations of state laws unless clearly mandated. The offense charged in the Indictment against Appellant attempted to describe as a Federal Offense an act which clearly constituted only a breach against the laws of the State of Missouri. (Section 561.450, Missouri Revised Statutes, clearly covers the alleged facts of the case here as it prohibits fraud by use of a false or bogus check.)

The statutory language involved in any federal law should be read and applied in light of the evils which gave rise to the statute and the aims which the proponents of this statute thought to achieve. *United State* v. *Carbone,* 327 U.S. 633, 637 (1946). Further, a federal statute is not intended to be used to assist the states in state law enforcement matters unless some authoritative spokesman has indicated that the statute was to be used for this purpose. *Chatwin* v. *United States,* 326 U.S. 455, 464 (1946). The power of the United States court is not to be involved to prohibit or to punish the perpetration of a crime against a state. *Pettibone* v. *United States,* 148 U.S. 197, 210 (1893).

As stated above, the courts have emphasized that 18 U.S.C.A. Sec. 1341 is not designed to reach all frauds, but is limited to only those instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law. A case similar to the facts of this case illustrates this point. In *U. S.* v. *Altobella,* 442 F.2d 310 (7th Cir., 1971), defendants were charged with violation of the so-called Travel Act, 18 U.S.C. Section 1952, and Conspiracy (18 U.S.C. 391). The facts were that the defendants were involved in a scheme to defraud a Philadelphia businessman who had traveled to Chicago on a business trip. A co-defendant, a lady of the night, made contact with the businessman, apparently took him to a room in a Chicago Hotel, induced him into a compromising position, whereupon the other defendants entered the room, took pictures, and eventually extorted money from the businessman. The Government charged use of facilities in interstate commerce—i.e., use of the mails—and alleged that the unlawful activity continued after the use of the mails. The "use of the mails" was that the victim had given defendants a $100 check which was written on a Philadelphia

Bank and went by mail through the Federal Reserve System. All parties agreed the Government had to show that the unlawful activity continued after the mails were used to make a case under Section 1952. The court stated:

> "But there is nothing about the appellant's enterprise, as disclosed by the evidence, which suggests any reason why state police powers need to be supplemented by the federal government. The use of the mails by the bank through which appellants' victim's check was cleared, a few days after it had been cashed at the Sherman House, was purely incidental to appellants' sordid scheme. Their purpose would have been achieved equally well if the victim had borrowed $100 from associates at the hotel or written a check on a local bank. Moreover, the unlawful activity which followed the cashing of the check was merely the payment of $50 to Patterson. Unquestionably, the distribution of proceeds of criminal activity may satisfy the "thereafter" requirement of the statute in a proper case. But when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed.
>
> Unquestionably appellants' unsuccessful attempt 'to make a fast buck' is punishable as a crime. We merely hold that the State of Illinois is the appropriate sovereign to prosecute their offense. We do not believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this. We are guided by the Supreme Court's admonition 'that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, * * *' Federal

Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881.

The judgment is reversed." (Footnotes omitted).

Unlike some federal acts the mail fraud statute was enacted to deal only with *distinctly federal crimes and was not a statute which was to be a part of a scheme of federal-state cooperation.* See *United States* v. *Sheridan,* 329 U.S. 379, 387 (1946).[1]

The indictment attempts to charge acts of the petitioner as a federal offense acts which clearly constitute only a breach of the laws of the State of Missouri. Such offenses, if found, affect only the State of Missouri, and only the State of Missouri should be prosecuting a case involving a bogus check given in the State of Missouri. *United States* v. *Taylor,* 480 F.2d 154 (1973); *United States* v. *Beall,* 126 F.Supp. 363, 366 (1954); *Bliss* v. *United States,* 354 F.2d 456, 459 (1966); *United States* v. *Flores,* 66 F.Supp. 880, 881 (1946) and *United States* v. *Hopper,* 63 F.Supp. 612, 613 (1945).

Petitioner suggests it would take the broadest construction to allow the federal government to prosecute the appellant on the alleged facts of this case, and further suggests this broad construction would allow the federal government to investigate every state offense and prosecute as a felony any offense against a state law in which a bad check was sent through the mail. Such interpretation would allow the federal government to come into a state unrequested and prosecute individuals who have

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1. The Legislative history of the Mail Fraud Act reveals that the intent was to *protect* the "Post Office Establishment" from "abuse" by those who would utilize correspondence with the intent to carry out a scheme to defraud. Act of June 8, 1872, 17 Stat. C. 323; later Section 548 of the Revised Statutes; see *Stokes* v. *U. S.,* 157 U.S. 187 (1895).

only violated state statutes. The broad interpretation urged on the court by the government would have one believe that the Congress of the United States intended to ensnare the unsuspecting citizenry of this country into violating a federal law by use of the postal service which has become a part of every day American life. In the landmark case of *Sorrells* v. *United States*, 287 U.S. 435 (1932), the Supreme Court decided that, though defendant had engaged in conduct proscribed by the language of the statute, it could not construe the law to apply where the defendant was entrapped into committing the otherwise illegal act. In explanation of the need for sensible application of acts of Congress, it said:

> "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. In United States v. Palmer, 3 Wheat. 610, 631, 4 L.Ed. 471, Chief Justice Marshall, in construing the Act of Congress of April 30, 1790, section 8 (1 Stat. 113), relating to robbery on the high seas, found that the words 'any person or persons' were 'broad enough to comprehend every human being,' but he concluded that 'general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.' In United States v. Kirby, 7 Wall. 482, 19 L.Ed. 278, the case arose under the Act of Congress of March 3, 1825 * * * (4 Stat. 104, §9), providing for the conviction of any person who 'shall, knowingly and wilfully, obstruct or retard the passage of the mail, or of any driver or carrier * * * carrying the same.' Considering the purpose of the statute, the Court held that it had no application to the obstruction or retarding of the passage

> of the mail or of its carrier by reason of the arrest of the carrier upon a warrant issued by a state court. The Court said: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' " *Id.* at 446, 447.

The principles announced in *Sorrells, supra,* take on special importance where, as here, we deal with the interpretation of a statute in the context of balancing federal and state interests. The relation between federal and state jurisdiction is an extremely sensitive one which requires the continual alertness of the judiciary lest imbalances occur in the constitutional framework of the union. In the case of *Palmer* v. *Massachusetts,* 308 U.S. 79, 83-84 (1935) Justice Frankfurter said:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. *Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.*" [Emphasis supplied].

Indeed, this Court has taken several recent opportunities to strike down literal interpretations of federal criminal statutes which would have encroached upon the domain traditionally left to the states. In *Rewis* v. *United States*, 401 U.S. 808 (1971), the Court considered the limits of the applicability of 18 U.S.C. §1952 (the "Travel Act") which forbids the use of facilities in interstate commerce in aid of unlawful activity. The Court reversed the conviction of two operators of a Florida lottery located just across the Georgia border. The Court of Appeals had affirmed their conviction on the ground that as gambling establishment operators they were liable for the reasonable foreseeability of interstate travel by their customers. *Rewis* v. *United States*, 418 F.2d 1218, 1222 (5th Cir. 1969). In refusing to extend the Travel Act that far the Court said:

> "Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." *Id.* at 811-12.

The desire to preserve this sensitive state-federal balance in the field of criminal jurisdiction was emphasized by this Court's decision in *United States* v. *Bass*, 434 F.2d 1296 (2d Cir. 1970), *affirmed*, 404 U.S. 336 (1971). In *Bass*, the Court narrowly read the firearms provision, 18 U.S.C. §1202(a) to require a nexus between possession

of a weapon and interstate commerce, rejecting the government's contention that the statute did not require such a showing of an interstate connection:

> "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* at 339.

The Court premised its holding upon two fundamental principles:

> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See also *Ladner* v. *United States*, 358 U.S. 169, 177 (1958); *Bell* v. *United States*, 349 U.S. 81 (1955) . . . ." *Id.* at 347.

> "There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism which have provided the basis for judge-made doctrines. See, *e.g.*, *Younger* v. *Harris*, 401 U.S. 37 (1971). As this Court emphasized only last Term in *Rewis* v. *United States*, *supra*, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear state-

ment assures that the legislature has in fact faced, and intended to bring into issue the criminal decision. In *Rewis* we declined to accept an expansive interpretation of the Travel Act. To do so, we said then 'would alter sensitive federal-state relationships [and] could overextend limited federal police resources.' While we noted there that '[i]t is not for us to weigh the merits of these factors,' we went on to conclude that 'the fact that they are not even discussed in the legislative history . . . strongly suggests that Congress did not intend that [the statute have the broad reach].' 401 U.S. at 812. In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." 404 U.S. at 349-50.

To like effect is *U. S.* v. *Enmons*, 35 L.Ed.2d 379 (1973).

It is obvious that the rationale developed by this Court in *Rewis* and in *Bass* apply with equal or greater force to this indictment. Similarly, the conduct alleged in the indictment is "readily denounced as criminal by the States." *Bass, supra,* at 349. In view of the intense connection between the alleged acts and the interests of the State of Missouri, the blunt assertion of a minor federal interest would clearly "alter sensitive federal-state relationships." *Bass, supra,* at 350. Thus, under the recent pronouncements of this Court, the extension of the mail fraud statute which the government urges is clearly unwarranted and would do great violence to the principle of American federalism.

Not only theoretical, but practical considerations as well urge rejection of this overblown concept of federal

jurisdiction. If this notion of the bounds of the mail fraud statute is to be applied equitably, rather than selectively, it would clearly represent a burden upon the strained resources of our law enforcement institutions and the courts. The Chief Justice of the United States has repeatedly warned of the evils of constantly expanding federal jurisdiction upon an already overburdened federal court system. See Burger, *The Courts on Trial,* 44 ABA Journal 738 [August, 1958], reprinted at 22 F.R.D. 71; Burger, *The State of the Judiciary—1970,* 56 ABA Journal 929 [October, 1970].

A particularly compelling need, according to the Chief Justice, is to strike a "proper jurisdictional balance" between federal and state court systems whereby the state courts undertake, in appropriate areas, much of the nation's expanding litigation, criminal and civil. See, Burger, *Has the Time Come?,* 55 F.R.D. 119, 120-21.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1730

UNITED STATES OF AMERICA,
Appellee,

vs.

JOHN SHERMAN MILES,
Appellant.

On Remand From The Supreme Court
Of The United States

Filed: June 17, 1974

Before GIBSON, LAY and ROSS, Circuit Judges.

PER CURIAM.

Judgment of conviction of defendant under 28 U.S.C. § 1341 was affirmed by this court on September 10, 1973. On March 18, 1974, the Supreme Court of the United States vacated the judgment of conviction and remanded the case

to this court for reconsideration in light of *United States* v. *Maze*, 94 S.Ct. 645 (1974). Upon review of the record and supplemental briefs filed by the parties, we affirm the judgment of conviction.

We hold that the use of the mails by the defendant was an essential and integral element of the fraudulent scheme. The scheme here did not reach fruition until the cattle were sold by the defendant and the monies divided among the co-conspirators. The defendant specifically contemplated the use of the mails by the banks to process the bogus check which was used to purchase the cattle. The delay in processing the check was not simply relied upon by the defendant to "postpone" discovery of the fraud; the evidence demonstrates it was part of the scheme itself. In this particular we find the facts distinguishable from *United States* v. *Maze, supra.*

We affirm the judgment of conviction.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

JUDGMENT OVERRULING PETITION FOR REHEARING OR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1730.

September Term, 1973

The United States,
Appellee,

vs.

John Sherman Miles,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

It is further ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date. If within said period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States

that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 10, 1974

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1730

United States of America,
Appellee,

v.

John Sherman Miles,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 11, 1973.
Filed: September 10, 1973.

Before Gibson, Lay and Ross, Circuit Judges.

Lay Circuit Judge.

Defendant, John Sherman Miles, was convicted of violating 18 U.S.C. § 1341.[1] The government charged in the

1. "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1341 (1949).

indictment that the defendant, along with Robert Totten and Gary Morris, participated in a fraudulent scheme to obtain cattle from a cattle sales barn in Fair Play, Missouri, with a no-account check and then to dispose of them "before the check . . . could clear through normal banking channels, and before the Fairplay Sales and Auction Company could thereby become aware of their loss and locate said cattle in the possession of John Sherman Miles."

Defendant raises several issues on appeal. We have considered each claim and find all but one lacking in substantiality.[2] We find substance only in the claim that the

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2. Defendant also asserts as error on appeal that:

(1) The trial judge failed on *one* occasion to properly admonish the jury before a recess not to discuss the case or read about it. This claim is frivolous; the record shows the trial judge meticulously admonished the jury throughout the trial. See *Kleven* v. *United States*, 240 F.2d 270, 274 (8th Cir. 1957); *Janko* v. *United States*, 281 F.2d 156, 170 (8th Cir. 1960).

(2) There was no corroboration of the testimony of Robert Totten, the accomplice. The record disputes this: For example, the defendant's truck was identified by an independent witness; the defendant was identified as selling the cattle in question; and, as the government notes, the defendant made a false exculpatory statement. In any event such corroboration is not necessary. See *United States* v. *Smith*, 464 F.2d 221, 222 (8th Cir. 1972).

(3) The court erred in refusing to give certain instructions relating to the testimony of an informant and the proper construction of § 1341. The defendant was sufficiently protected by the court's instruction on the credibility of an accomplice's testimony. There is no prejudice demonstrated in the court's instruction on § 1341.

(4) The court erred in not requiring the government to comply with 18 U.S.C. § 3500 by disclosing the grand jury testimony of the witness Totten. The record clearly discloses that the court made available to defense counsel the complete transcript of Totten's grand jury testimony.

(5) Exculpatory information possessed by a prospective government witness, Morris, not called by either side, was not disclosed to the defendant. Again, the record discloses that Morris was present to be interviewed; that defendant's counsel declined to interview him, notwithstanding the government's pretrial disclosure to counsel that he should perhaps talk to Morris since "we believe that he may be willing to give testimony at trial which would be favorable to the defense."

defendant was entitled to an acquittal at the close of the government's case since there was no evidence that use of the mails played any part in the execution of the scheme. Upon analysis, however, we affirm the conviction.

Robert Totten testified that the defendant, John Miles, Gary Morris and himself devised a plan whereby Morris and Totten, Morris' roommate, would buy some cattle at Fair Play, Missouri, with a no-account check drawn on a bank at Leeton, Missouri, using a false driver's license in the name of "John W. Rogers" as identification. The details of the plan were worked out on three separate occasions. Miles supplied Totten with the false driver's license and a blank counter check from the Leeton, Missouri, bank. After the cattle were bought in the name of Rogers, Morris and Totten returned for them that night in Miles' truck and took them back to Miles' farm. They purchased 71 head of cattle, but because of the size of Miles' truck they had to leave 15 head behind at the auction yards in Fair Play. This fact along with the identification of Miles' truck helped lead to the discovery of the fraud. When Miles received the cattle the plan called for him immediately to dispose of them by selling the cattle at various auction barns in Missouri. The three were to divide up the proceeds equally, but were apprehended before completing the scheme.

The evidence showed that Miles had been in the cattle business for years, buying and selling cattle at various auction companies. According to Totten, Miles picked the particular day, February 21, 1972, to try out the scheme since it was a holiday and the bank at Leeton, upon which the no-account check was drawn, would be closed. According to Totten the three of them discussed the fact that the cattle should be disposed of as soon as possible, within a week at the most, because that is how long it would take

for the check "to come back to the place where you wrote the check before they found out it wasn't any good." They did not specifically discuss how the check would go through banking channels.

Defendant urges that the record is void of any evidence that the defendant contemplated use of the mails for furtherance of the fraudulent scheme. In support of this argument defendant relies on *Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 780 (1960); and *Dyhre* v. *Hudspeth*, 106 F.2d 286 (10th Cir. 1939). The thrust of these cases is that where the fraudulent scheme comes to fruition prior to the use of the mails, the mails are merely incidental to and not an integral part of the scheme. Under such circumstances, section 1341 has been held not to apply since one of the essential elements for violation of the statute is use of the United States mails for the purpose of executing such scheme or artifice. As held in *Dyhre*, where a fraudulent check was written to obtain merchandise, the fact that the banks had to send the check through the mails for collection was merely incidental to the fraud, since the defendant had "accomplished all he set out to do in falsely representing that he had money on deposit in the banks." *Dyhre*, supra at 288. The Tenth Circuit recently reaffirmed *Dyhre*, finding the fraudulent use of a BankAmericard not covered by section 1341 since "the scheme [had] been fully consummated." *United States* v. *Lynn*, 461 F.2d 759, 762 (10th Cir. 1972). See also *United States* v. *Maze*, 468 F.2d 529 (6th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3589 (May 7, 1973).

However, it is clear that the principle of *Kann* and *Parr* does not establish a rigid rule. As observed by the Ninth Circuit in *United States* v. *Strauss*, 422 F.2d 375, 380 (1970), *cert. denied*, 405 U.S. 989 (1972):

"However, the Supreme Court has also said that neither *Kann* nor *Parr* announced an inflexible rule that the use of the mails after the victims' money had been obtained can never be for the purpose of executing the fraud. United States v. Sampson, 371 U.S. 75, 80, 83 S. Ct. 173, 9 L.Ed. 2d 136 (1965). Here the use of the mails 'caused' by the defendant provided or contributed to a time lag which was intended to aid in avoiding detection. See United States v. Decker, 411 F.2d 306 (4th Cir. 1969); United States v. Hendrickson, 394 F.2d 807 (6th Cir. 1968). The mailing, established by the evidence, we find to have been an integral part of the scheme to defraud."

The *Kann* and *Parr* cases were further explicated by the Supreme Court in *United States* v. *Sampson*, 371 U.S. 75, 79-80 (1962):

"In *Kann*, the defendants defrauded their corporate employer in matters confined to their local region. As a part of their scheme, the defendants had fraudulently obtained checks payable to them which were cashed or deposited at a bank. The use of the mails charged as a violation of the federal statute was the mailing of the checks for collection by the banks which cashed them to the banks upon which they were drawn. Prior to that mailing, the Court found, the defendants had obtained the money they sought, and as far as they were concerned their plan had reached its fruition and come to a complete rest. The scheme, as the Court viewed it, had contemplated no more. The mailing was done by outsiders, the banks, which had no connection whatsoever with the fraud. *The checks were mailed for the banks' own purposes and not in any way for furthering of the fraudulent scheme.* In the Court's view it was immaterial to the consum-

mation of the defendants' scheme how or whether the banks which had cashed the checks sought to collect them.

"In *Parr*, the second case upon which the District Court relied, the defendants had obtained gasoline and other products and services for themselves by the use of the credit card of a School District which had authorized the defendants to use the card for the District's purposes only. The mailings complained of in the *Parr* case were two invoices sent by the oil company to the District and the District's check mailed back in payment. Again the Court was able to find that the mailings by the outsiders were not an integral part of the scheme as planned and executed by the defendants and that, as a matter of fact, it was completely immaterial to them what the oil company did about collecting its bill.

"We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule *that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme.* Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes." (Our emphasis).

See also *Friedman* v. *United States*, 347 F.2d 697, 710 (8th Cir.), *cert. denied*, 382 U.S. 946 (1965).

We conclude that there is sufficient evidence to demonstrate that the use of the mails was an essential part of the fraudulent scheme. The facts at bar are distinguishable from those cases where a party merely seeks to obtain merchandise by use of fraudulent checks. Here the scheme had not come to rest. In fact, Miles did not assume an active role in the overall conspiracy until after the cattle had been fraudulently obtained. The scheme was still continuing—possession of the cattle was only a step toward consummation of it. The real goal was to obtain money and the end of the rainbow was not to be reached until Miles sold the cattle and the money was divided up. The one-week delay before the phoney check would be processed by the bank was necessary for Miles to resell the cattle. We find the facts and reasoning of the Fourth and Fifth Circuit cases appropriate here.

As the court said in *United States* v. *Decker*, 411 F.2d 306, 308 (4th Cir. 1969):

> "The United States takes the position that the passage of these checks through the mails were crucial to the success of Decker's scheme, as he thereby gained the delay necessary to avoid detection before moving on to another city. The only question for decision on Decker's claim that the district court erred in refusing to dismiss the indictment is whether such a scheme, adequately charged in the indictment, constitutes a violation of the mail fraud statute. We conclude that it does."

Similarly the Fifth Circuit reasoned in *Bauman* v. *United States*, 156 F.2d 534, 537 (5th Cir. 1946):

> "Since the transmittal of the checks through the mails to Amarillo, with the necessity of getting a return

thereon before their fraudulent nature was discovered if, indeed, it were ever discovered, was a part of the scheme, and since such delay would enable defendant to give the scheme a wider scope of operations and require less haste in getting away than if the checks had been forged against an account in a local bank where the discovery of the forgery would, perhaps, have been more prompt, we think that the contention that the scheme did not embrace the mailing is contrary to the wording of the indictment and in disregard of the realities."

See also *United States* v. *Hendrickson*, 394 F.2d 807 (6th Cir. 1968), *cert. denied*, 393 U.S. 1031 (1969).

This court has held:

"[T]he use of the mails in the execution of a scheme to defraud may be established by circumstantial evidence." *Corbett* v. *United States*, 89 F.2d 124, 127 (8th Cir. 1937).

Various bankers testified at the trial that the only way they handle a check such as was given at Fair Play is by mailing it to the various other banking institutions involved.

The Supreme Court has said that a defendant causes the mails to be used:

"Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

Similarly, it has been observed:

> "To establish that the several uses of the mail were caused by defendant, it was sufficient to show that he set forces in motion which foreseeably would involve mail uses." *Marvin* v. *United States*, 279 F.2d 451, 454 (10th Cir. 1960).

The use of the mails by banks to process collection on "out-of-town" checks is a reasonably foreseeable event. Cf. *United States* v. *Strauss*, 452 F.2d 375, 380 (7th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.